No. 94-286

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In the Supreme Court of the United States

OCTOBER TERM, 1994

FREIGHTLINER CORPORATION,
Petitioner,

v.

BEN MYRICK and EMILY MYRICK,
Respondents.

NAVISTAR INTERNATIONAL TRANSPORTATION CORP.,
Petitioner,

v.

JACK LINDSEY, Executor of the Estate and Surviving Spouse of Grace C. Lindsey,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

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MOTION FOR LEAVE TO FILE BRIEF AND BRIEF FOR AMERICAN TRUCKING ASSOCIATIONS, INC. AS AMICUS CURIAE SUPPORTING THE PETITION

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MOTION OF AMERICAN TRUCKING ASSOCIATIONS, INC. FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE IN SUPPORT OF THE PETITION

Pursuant to Rule 37.2 of the Rules of this Court, American Trucking Associations, Inc. (ATA) respectfully moves for leave to file the accompanying brief as *amicus*

curiae in support of the petition for a writ of certiorari. Counsel for petitioners has consented to the filing of the brief; however, counsel for respondents has declined consent.

ATA is a trade association of motor carriers, state trucking associations, and national trucking conferences created to promote and protect the interests of the trucking industry. That industry consists of every type of motor carrier operation throughout the United States and includes tens of thousands of for-hire carriers, private carriers, leasing companies, and trucking suppliers. ATA regularly advocates the trucking industry's interests before this Court and other courts.

ATA's members have a strong interest in motor vehicle and — in particular — truck safety issues. The Federal Motor Vehicle Safety Standard at issue in this case, 49 C.F.R. § 571.121 (FMVSS 121), grants an option whether to install antilock braking devices on trucks and trailers. The court of appeals nonetheless held that FMVSS 121 does not preempt inconsistent state common law standards and that lay juries are at liberty to second-guess the policy judgment of an expert federal administrative agency on the complex issue whether trucks must have antilock brakes. That holding has substantial significance to ATA's members, who put thousands of trucks on the road every day of the year.

Moreover, the court of appeals adopted an unprecedented and plainly erroneous interpretation of this Court's decision in *Cipollone* v. *Liggett Group, Inc.*, 112 S. Ct. 2608 (1992), that conflicts with numerous decisions by other federal and state courts. If not reversed, the court's ruling will have a profound and deleterious effect not only on federal motor vehicle safety standards but in all cases in which a federal preemption defense is properly advanced by those (such as ATA's members) who must comply with uniform federal safety standards.

ATA seeks to inform the Court of the importance of the issues raised by the petition, particularly as they affect the trucking industry, and the potential adverse consequences of leaving those issues unreviewed.

For the foregoing reasons, the motion of ATA to file the accompanying brief as *amicus curiae* in support of the petition for a writ of certiorari should be granted.

Respectfully submitted.

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BRIEF FOR AMERICAN TRUCKING ASSOCIATIONS, INC. AS AMICUS CURIAE IN SUPPORT OF THE PETITION

INTEREST OF THE AMICUS CURIAE

The interest of the *amicus curiae* is described in the accompanying motion for leave to file this brief.

STATEMENT

Respondents brought tort actions under Georgia law seeking damages from petitioners based solely on the fact that petitioners' trucks, which were involved in accidents affecting respondents, did not have antilock brakes. Petitioners raised a federal law preemption defense, citing their compliance with the National Traffic and Motor Vehicle Safety Act, 15 U.S.C. §§ 1381-1431 (recodified at 49 U.S.C. §§ 30101-30169) (Safety Act),[1] and Federal Motor Vehicle Safety Standard (FMVSS) 121, 49 C.F.R. § 571.121, promulgated by the National Highway Traffic Safety Administration (NHTSA) under the Safety Act, which grants an option to install antilock brakes on trucks and trailers. In fact, FMVSS 121 was specifically amended by NHTSA to make antilock brakes optional, see 44 Fed. Reg. 46,849 (1979), because, as the Ninth Circuit found in *Paccar, Inc.* v. *National Highway Traffic Safety Admin.*, 573 F.2d 632, 640 (9th Cir.), cert. denied, 439 U.S. 862 (1978), "unforeseen problems in the development of the new braking systems" made a standard mandating antilock brakes "neither reasonable nor practicable" and "created a potentially * * * hazardous highway situation" (*id.* at 643). Nonetheless, the Eleventh Circuit rejected petitioners' preemption defense.

Without a hint of its drastic consequences, the court of appeals' decision would — if left undisturbed by this Court — revolutionize federal preemption law. Over a vigorous dissent, the panel majority concluded that this Court's decision in *Cipollone* v. *Liggett Group, Inc.*, 112 S. Ct. 2608 (1992), mandated "that when there is an express pre-emption provision [in a federal statute] we should not consider implied pre-emption" (Pet. App. 11a), even if there is an actual conflict between federal and state law. Under this reading of

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[1] For ease of reference, we (as do petitioners) cite to the prior codification, which was cited by the courts below.

Cipollone, conduct *required* by federal law may be *prohibited* by state law.

No decision by this Court has ever adopted or even remotely suggested this astounding result in the face of the Supremacy Clause of the Constitution. U.S. Const. art. VI. Indeed, the Eleventh Circuit's ruling is flatly inconsistent with this Court's precedents both before and after *Cipollone* and creates a sharp conflict with numerous federal and state court decisions. Review by this Court is essential.

ARGUMENT

I. THE ELEVENTH CIRCUIT MISAPPLIED THIS COURT'S PRECEDENTS AND CREATED A SQUARE CONFLICT AMONG THE LOWER COURTS ON THE IMPORTANT QUESTION WHETHER THE SAFETY ACT IMPLIEDLY PREEMPTS INCONSISTENT COMMON LAW TORT CLAIMS

Joining all of the other circuits that had addressed the issue,[2] the Eleventh Circuit held in *Taylor* v. *General Motors Corp.*, 875 F.2d 816 (1989), cert. denied, 494 U.S. 1065 (1990), that common law claims based on an automobile manufacturer's failure to install airbags were impliedly preempted under the Safety Act and FMVSS 208, 49 C.F.R.

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[2] See *Wood* v. *General Motors Corp.*, 865 F.2d 395 (1st Cir. 1988), cert. denied, 493 U.S. 804 (1989); *Kitts* v. *General Motors Corp.*, 875 F.2d 787 (10th Cir. 1989), cert. denied, 494 U.S. 1065 (1990); *Pokorny* v. *Ford Motor Co.*, 902 F.2d 1116 (3d Cir.), cert. denied, 498 U.S. 853 (1990). A number of state appellate courts had reached the same result. See, *e.g.*, *Nissan Motor Corp.* v. *Superior Court*, 261 Cal. Rptr. 80 (Cal. App. 1989), cert. denied, 494 U.S. 1066 (1990); *Gardner* v. *Honda Motor Co.*, 536 N.Y.S. 2d 303 (App. Div. 1988), app. dismissed, 543 N.Y.S.2d 401 (1989); *Wickstrom* v. *Maplewood Toyota, Inc.*, 416 N.W.2d 838 (Minn. Ct. App. 1987), cert. denied, 497 U.S. 1236 (1988).

§ 571.208, because state tort law would conflict with and frustrate the purposes of the federal regulatory scheme. 875 F.2d at 825-827. Relying on numerous preemption decisions of this Court, the Eleventh Circuit in *Taylor* concluded that "a state common law rule cannot take away the flexibility provided by a federal regulation, and cannot prohibit the exercise of a federally granted option." *Id.* at 827.

The same result should have obtained in this case because FMVSS 121, like FMVSS 208, grants a federal safety option. In *Taylor*, the option was a choice under FMVSS 208 between seat belts and airbags; here it is a choice under FMVSS 121 whether to install antilock brakes. Here, as in *Taylor*, plaintiffs' claims are impliedly preempted because they conflict with federal law by seeking damages from defendants for exercising an FMVSS option.

The Eleventh Circuit, however, refused to follow its own precedents and the unbroken chain of rulings from other circuits finding implied preemption under the Safety Act. Instead, the court of appeals charted a new course in federal preemption law by holding that it was powerless to engage in any implied preemption analysis. This remarkable conclusion was based upon a plain misreading of this Court's decision in *Cipollone*.

A. *Cipollone* Did Not Radically Transform Preemption Law.

The Eleventh Circuit held that it was obliged to reconsider its holding in *Taylor* in light of a single sentence in *Cipollone* stating that if a federal statute has an express preemption clause and if "that provision provides a 'reliable indicium of congressional intent with respect to state authority,' * * * 'there is no need to infer congressional intent to pre-empt state laws from the substantive provisions' of the legislation." 112 S. Ct. at 2618. The court of appeals broadly interpreted this one sentence to mean that the implied preemption doctrine is no longer applicable to statutes with

express preemption clauses. Because the Safety Act has such a clause, 15 U.S.C. § 1392(d), the majority abandoned *Taylor*'s implied preemption analysis (Pet. App. 11a).

1. This holding is flatly inconsistent with this Court's precedents. As a threshold matter, it is implausible that in one sentence the *Cipollone* Court intended to repudiate a long line of preemption decisions permitting (indeed, accepting) implied preemption arguments regarding statutes with express preemption clauses. See, *e.g.*, *Ingersoll-Rand Co.* v. *McClendon*, 498 U.S. 133, 139-140 (1990); *Northwest Cent. Pipeline Corp.* v. *Kansas Corp. Comm'n*, 489 U.S. 493, 509-522 (1989); *Jones* v. *Rath Packing Co.*, 430 U.S. 519, 540-543 (1977).[3] This reading of *Cipollone* is especially improbable given the complete absence of any suggestion that this Court was embarking on such a radical course. See, *e.g.*, *Lee* v. *Weisman*, 112 S. Ct. 2649, 2655 (1992).

Furthermore, the Eleventh Circuit's interpretation is contrary to this Court's decisions rendered before and after *Cipollone*. In *Gade* v. *National Solid Wastes Management Ass'n*, 112 S. Ct. 2374 (1992), for example, the plurality held that a state law was impliedly preempted despite an express preemption clause in the federal statute. The court of appeals dismissed *Gade* as a mere plurality opinion (Pet. App. 14a). The significance of *Gade*, however, is that the opinion was

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[3] The court of appeals' interpretation of *Cipollone* is also at odds with the proposition that state laws conflicting with federal law are preempted "by direct operation of the Supremacy Clause," *i.e.*, without regard to whether the federal statute or regulation contains a preemption clause. *Brown* v. *Hotel & Restaurant Employees & Bartenders Int'l Union*, 468 U.S. 491, 501 (1984). As Justice Souter observed last Term, "whether or not Congress has used any special 'preemptive' language, state regulation must yield to the extent it actually conflicts with federal law." *BFP* v. *Resolution Trust Corp.*, 114 S. Ct. 1757, 1776 (1994) (Souter, J., dissenting, joined by Blackmun, Stevens, and Ginsburg, JJ.)

joined by three Justices (the Chief Justice and Justices O'Connor and White) who would — six days later — join the sentence in *Cipollone* that the court below interpreted to bar implied preemption in the face of an express preemption clause. This is strong evidence that the Eleventh Circuit's reading of *Cipollone* cannot possibly be correct.

Indeed, after *Cipollone*, this Court decided *CSX Transp., Inc.* v. *Easterwood*, 113 S. Ct. 1732 (1993), which considered whether state tort claims regarding a warning device at a railroad crossing were preempted by the Federal Railroad Safety Act (FRSA). The FRSA has an express preemption clause that bars any state law requirement that relates to railroad safety when there is a federal "rule, regulation, order, or standard covering the subject matter of such State requirement." 45 U.S.C. § 434. Because the Court concluded that the federal regulations at issue did not "cover" the same subject matter as the tort claims, it held that those claims were not expressly preempted. 113 S. Ct. at 1742. The Court then proceeded to "reject" the "claim of implied 'conflict' preemption, * * * on the basis of the preceding analysis" (*id.* at 1742 n.12).

The Eleventh Circuit read *Easterwood* as precluding a "separate implied pre-emption analysis" if there is an express preemption clause in a statute (Pet. App. 17a). However, as Judge Hill noted in his dissent, the more persuasive interpretation is that the Court "did not conduct an implied conflict pre-emption analysis because, 'on the basis of the preceding analysis,' it found no conflict between the federal regulations and the common law negligence claim" (Pet. App. 30a). Thus, this Court rejected implied preemption *on the merits*, not because it was inappropriate to consider the contention.

In fact, the *Easterwood* Court stated that an express preemption clause is *not* dispositive: "If the statute contains an express pre-emption clause, the task of statutory

construction must *in the first instance* focus on the plain wording of the clause, which necessarily contains the best evidence of Congress' pre-emptive intent." 113 S. Ct. at 1737 (emphasis added). In this case, by contrast, the court of appeals held that an express preemption clause is not the first but the *only* evidence ("the alpha and omega" (Pet. App. 18a)) of Congress' preemptive intent.

2. A careful reading of *Cipollone* and *Easterwood* reveals that implied preemption has *not* been abolished in *all* cases involving a federal statute with an express preemption clause. Instead, *Cipollone* holds only that because congressional intent is the touchstone of preemption analysis, implied preemption arguments might be barred where a statute's express preemption clause "provides a 'reliable indicium of congressional intent with respect to state authority.'" 112 S. Ct. at 2617, 2618 (citation omitted).[4]

For at least two reasons that were rejected without serious analysis by the court of appeals, the Safety Act's

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[4] The Eleventh Circuit cavalierly brushed aside the "reliable indicium" requirement of *Cipollone*, finding it "not much of a hurdle" (Pet. App. 18a). Although the court recognized that this requirement was a "condition" of this Court's analysis (*ibid.*), it converted this condition into a "presumption" (*id.* at 19a) — with no precedent or rationale to support it — that a preemption clause, in and of itself, is always a reliable indicium of congressional intent to eliminate implied preemption. This presumption, in the court of appeals' view, is virtually conclusive: a preemption clause is "the alpha and omega" of the inquiry on congressional intent (*id.* at 18a).

If anything, the presumption should operate in the opposite direction. Absent compelling evidence to the contrary, it should be presumed that Congress did *not* intend to eliminate the implied preemption doctrine. After all, why would Congress want to authorize state action that conflicts with or frustrates the purposes of federal law?

preemption clause does not provide a reliable indication of congressional intent to preclude implied preemption of state laws that conflict with the federal scheme embodied in the Act. First, 15 U.S.C. 1392(d) does not purport to be an exhaustive description of the state authority that Congress meant to displace. Notably, this case involves preemption by federal regulation. Where the source of preemptive federal action is an administrative agency rather than Congress itself, it is unreasonable to expect a statutory express preemption provision to define the full scope of preemption required to ensure the supremacy of federal law. This is especially true here because the safety regulations were issued under a broad delegation of congressional power. See 15 U.S.C. §§ 1381, 1392(a), 1407.

Second, the Safety Act's preemption section does not provide a "reliable indicium" of Congress' preemptive intent because it does not reflect all of the available evidence of Congress' thinking. The savings clause included in Section 1397(k) — compliance with a safety standard "does not exempt any person from liability under common law" — shows that Congress expected implied preemption to operate under the Safety Act. The savings clause was added to prevent implied *field* preemption from entirely displacing state law (see pp. 15-16, *infra*), but Congress did not save state law claims from implied *conflict* preemption. Indeed, there would have been no need to adopt a savings clause at all if the mere existence of an express preemption clause foreclosed any implied preemption inquiry. Moreover, no presumption against preemption is applicable in deciding whether state law conflicts with federal law. See *Felder* v. *Casey*, 487 U.S. 131, 138 (1988).

A recent amendment to the Safety Act, not discussed by the court of appeals, provides further evidence that the court's conclusion on congressional intent is wrong. In reauthorizing the Safety Act in 1991, Congress explicitly ratified implied preemption in directing NHTSA to amend FMVSS 208 to

require airbags in all new motor vehicles. Congress recognized that several courts had held that tort suits based on the failure to install airbags were impliedly preempted and that the "all airbag" amendment might be construed as disturbing those precedents. See Pub. L. No. 102-240, § 2508(d), 105 Stat. 2086 (1991); H.R. Conf. Rep. No. 404, 102d Cong., 1st Sess. 403 (1991), *reprinted in* 1991 U.S.C.C.A.N. 1679, 1783. The 1991 amendment therefore specified that it

> shall [not] be construed by any * * * court as indicating an intention by Congress to affect, change, or modify in any way the liability, if any, of a motor vehicle manufacturer under applicable law relative to vehicles with or without inflatable restraints.

Section 2508(d), 105 Stat. 2086. The conference report, citing the prior decisions on implied preemption, explained that Congress "do[es] not want by this section to change the law on liability as it existed prior to enactment" (*i.e.*, late November 1991). H.R. Conf. Rep. No. 404, *reprinted in* 1991 U.S.C.C.A.N. at 1783. This legislation and its history show conclusively that — contrary to the Eleventh Circuit's holding — the Safety Act's express preemption provision does not reliably indicate Congress' intent to preclude implied preemption analysis.

B. The Court Of Appeals' Decision Conflicts With Numerous Federal And State Precedents.

1. As noted above, the Eleventh Circuit's decision in this case conflicts directly with decisions by the First, Third, and Tenth Circuits finding implied preemption of common law tort claims by the Safety Act. See *Wood* v. *General Motors Corp.*, 865 F.2d 395 (1st Cir. 1988), cert. denied, 493 U.S. 804 (1989); *Kitts* v. *General Motors Corp.*, 875 F.2d 787 (10th Cir. 1989), cert. denied, 494 U.S. 1065 (1990); *Pokorny* v. *Ford Motor Co.*, 902 F.2d 1116 (3d Cir.), cert. denied, 498 U.S. 853 (1990). Moreover, a

number of courts have considered this issue since *Cipollone* was decided and have, unlike the Eleventh Circuit, found implied preemption under the Safety Act. See, *e.g.*, *Boyle* v. *Chrysler Corp.*, 501 N.W.2d 865 (Wis. Ct. App. 1993); *Marrs* v. *Ford Motor Co.*, 852 S.W.2d 570 (Tex. Ct. App. 1993); *Gills* v. *Ford Motor Co.*, 829 F. Supp. 894 (W.D. Ky. 1993).

The conflict between the lower courts on this important issue is real and will not dissipate. Just weeks ago, the Eleventh Circuit in *Hunnings* v. *Texaco, Inc.*, 1994 WL 424296, *7 (Aug. 12, 1994), reaffirmed its holding in this case and "decline[d] the defendants' invitation to conduct an implied preemption analysis" simply because the federal statutes at issue (the Federal Hazardous Substances Act, 15 U.S.C. § 1261, *et seq.*, and the Poison Prevention Packaging Act of 1970, 15 U.S.C. § 1471, *et seq.*) had express preemption provisions. *Ibid.* (citing *Myrick* v. *Freuhauf Corp.*, 13 F.3d 1516 (11th Cir. 1994)). The D.C. Circuit, on the other hand, recently stated in *Jackson* v. *Culinary School of Washington, Ltd.*, 27 F.3d 573, 580 n.12 (1994) that it does

> not read *Cipollone* to stand for the proposition that the enumeration of preempted areas in a statute forecloses altogether the possibility that state statutes in actual conflict can be preempted. The overriding focus of preemption analysis is on the intent of Congress. See *CSX* v. *Easterwood*, 113 S. Ct. 1732, 1737 (1993); *Cipollone*, 112 S. Ct. at 2617. Where a state statute actually frustrates the purposes of Congress, we do not believe that the specific preemption clauses in a statute alone provide a "reliable indicium of congressional intent with respect to state authority." *Cipollone*, 112 S. Ct. at 2618.

Thus, unlike the Eleventh Circuit, the D.C. Circuit does not read *Cipollone* to preclude an implied preemption analysis just

because the federal statute at issue has an express preemption provision.

2. The Eleventh Circuit sought to minimize the significance of its holding (which is, in fact, revolutionary) by asserting that "at least eight of our sister circuits have reached the same conclusion about the meaning of the *Cipollone* decision." Pet. App. 11a. That statement is simply incorrect. None of the cases cited held that an express preemption clause precludes consideration of implied preemption where — as in this case — there is an actual conflict between federal and state law. In most of the cases cited by the Eleventh Circuit, the courts found express preemption.[5] Accordingly, those courts had no occasion to decide whether implied preemption bars a state law that is beyond the scope of an express preemption clause but conflicts directly with federal law.

In three of the cases cited by the court of appeals, there was no conflict between state and federal law,[6] and in one of them the Second Circuit stated that "a finding of implied preemption * * * is not *automatically* foreclosed by the existence of a preemption clause." *Toy Mfrs. of Am., Inc.* v. *Blumenthal*, 986 F.2d 615, 623 (2d Cir. 1993) (emphasis in original). Thus, there is no support in the other circuits for

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[5] *Worm* v. *American Cyanamid Co.*, 5 F.3d 744 (4th Cir. 1993); *Kinley Corp.* v. *Iowa Utils. Bd.*, 999 F.2d 354 (8th Cir. 1993); *Weber* v. *Heaney*, 995 F.2d 872 (8th Cir. 1993); *Stamps* v. *Collagen Corp.*, 984 F.2d 1416 (5th Cir.), cert. denied, 114 S. Ct. 86 (1993); *Greenwood Trust Co.* v. *Commonwealth of Massachusetts*, 971 F.2d 818 (1st Cir. 1992), cert. denied, 113 S. Ct. 974 (1993).

[6] *Draper* v. *Chiapuzio*, 9 F.3d 1391 (9th Cir. 1993); *Toy Mfrs. of Am., Inc.* v. *Blumenthal*, 986 F.2d 615 (2d Cir. 1993); *Cleveland* v. *Piper Aircraft Corp.*, 985 F.2d 1438 (10th Cir.), cert. denied, 114 S. Ct. 291 (1993).

the new trail in federal preemption law blazed by the Eleventh Circuit.

II. THE ELEVENTH CIRCUIT MISAPPLIED THIS COURT'S PRECEDENTS AND CREATED A SQUARE CONFLICT AMONG THE LOWER COURTS IN FINDING THAT THE SAFETY ACT DOES NOT EXPRESSLY PREEMPT RESPONDENTS' CLAIMS

The court of appeals' decision is flatly inconsistent with the rulings of other lower courts in yet another respect: its rejection of express preemption in light of this Court's controlling decision in *Cipollone*.

1. In rejecting express preemption (Pet. App. 7a-11a), the Eleventh Circuit applied — without questioning — its holding in *Taylor* that common law claims did not fall within the express preemption provision of the Safety Act because Congress failed to "make explicit reference to state common law in the Act's preemption clause." 875 F.2d at 824. This rationale was clearly repudiated by *Cipollone*, which held that the express preemption provision at issue in that case included common law duties even though it spoke only in terms of "'requirement[s] or prohibition[s] * * * imposed under State law.'" See 112 S. Ct. at 2619-2621 (plurality) (citation omitted); *id.* at 2634 (Scalia, J.). The *Cipollone* Court held that it made no difference that the preemption provision failed to "make explicit reference" to common law claims.

Since this Court's decision in *Cipollone*, seven circuits have addressed the issue of federal preemption under analogous statutes and concluded that preemption of state law "requirements" or "standards" necessarily meant that Congress intended expressly to preempt common law claims.[7] Following *Cipollone*, the overwhelming majority of

[7] See *Gile* v. *Optical Radiation Corp.*, 22 F.3d 540, 542 (3rd Cir. 1994); *Worm*, 5 F.3d at 748-49; *King* v. *E.I. Du Pont de Nemours & Co.*, 996 F.2d 1346, 1349 (1st Cir.), cert. dismissed, 114 S.Ct. 490 (1993); *Shaw* v. *Dow Brands, Inc.*, 994 F.2d 364, 371 (7th Cir. 1993); *Papas* v. *Upjohn Co.*, 985 F.2d 516, 517 (11th Cir.), cert. denied, 114 S.Ct. 300 (1993); *Arkansas-Platte & Gulf Partnership* v. *Van Waters & Rogers, Inc.*, 981 F.2d 1177, 1179 (10th Cir.), cert. denied, 114 S.Ct. 60 (1993); *Stamps*, 984 F.2d at 1424.

courts across the country have reached the same conclusion interpreting the scope of preemption clauses under numerous federal health and safety statutes, including the Federal Insecticide, Fungicide and Rodenticide Act, 7 U.S.C. § 136, *et seq.*,[8] the Federal Hazardous Substances Act, 15 U.S.C. § 1261, *et seq.*,[9] the Medical Device Amendments of 1976

[8] See, *e.g.*, *MacDonald* v. *Monsanto Co.*, 27 F.3d 1021, 1024 (5th Cir. 1994); *Bingham* v. *Terminix Int'l Co.*, 850 F. Supp. 516, 520 (S.D. Miss. 1994); *Allen* v. *Pennco Engineering Co.*, 847 F. Supp. 1315, 1319 (M.D. La. 1994); *Trinity Mountain Seed Co.* v. *MSD Agvet, Div. of Merck & Co.*, 844 F.Supp. 597, 601 (D. Idaho 1994); *Quad R Farms* v. *American Cyanamid Co.*, 840 F. Supp. 694 (D. Minn. 1993); *DerGazarian* v. *Dow Chem. Co.*, 836 F. Supp. 1429, 1447 (W.D. Ark. 1993); *Kolich* v. *Sysco Corp.*, 825 F. Supp. 959, 961 (D. Kan. 1993); *Levesque* v. *Miles Inc.*, 816 F. Supp. 61, 69 (D.N.H. 1993); *Casper* v. *E.I. Du Pont de Nemours & Co.*, 806 F. Supp. 903, 907 (E.D. Wash. 1992); *Burke* v. *Dow Chem. Co.*, 797 F. Supp. 1128, 1140 (E.D.N.Y. 1992); *Gibson* v. *Dow Chem. Co.*, 1992 WL 404681, *2 (E.D. Ky. 1992); *Brennan* v. *Dow Chem. Co.*, 613 So. 2d 131, 132 (Fla. Dist. Ct. App. 1993); *Yowell* v. *Chevron Chem. Co.*, 836 S.W.2d 62, 66 (Mo. Ct. App. 1992); *June* v. *Laris*, 602 N.Y.S.2d 778, 784 (N.Y. Sup. Ct. 1993); *Hopkins* v. *Ciba-Geigy Corp.*, 432 S.E.2d 142, 145-46 (N.C. Ct. App. 1993).

[9] See, *e.g.*, *Moss* v. *Parks Corp.*, 985 F.2d 736, 740 (4th Cir.), cert. denied, 113 S.Ct. 2999 (1993); *DeHaan* v. *Whink Prods. Co.*, 1994 WL 24322, *6 (N.D. Ill. Jan. 26, 1994); *Salazar* v. *Whink*

to the Federal Food, Drug and Cosmetic Act, 21 U.S.C. § 360c, *et seq.*,[10] and the Federal Boat Safety Act, 46 U.S.C. § 4301, *et seq.*[11]

The Eleventh Circuit's holding in this case that the reference in the Safety Act's preemption clause to any inconsistent state "safety standard" does *not* encompass common law standards thus conflicts with this Court's decision in *Cipollone* and the scores of federal and state court decisions post-*Cipollone* finding express preemption in similar contexts. See also *Asahi Metal Indus. Co.* v. *Superior Court*,

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Prods. Co., 1994 WL 115876, *2 (Colo. Ct. App. Apr. 7, 1994); *State ex rel. Jones Chemicals, Inc.* v. *Seier*, 871 S.W.2d 611 (Mo. Ct. App. 1994).

[10] See, *e.g.*, *Mendes* v. *Medtronic, Inc.*, 18 F.3d 13 (1st Cir. 1994); *King v. Collagen Corp.*, 983 F.2d 1130, 1135 (1st Cir.), cert. denied, 114 S.Ct. 84 (1993); *Slater* v. *Optical Radiation Corp.*, 961 F.2d 1330, 1333 (7th Cir.), cert. denied, 113 S.Ct. 327 (1992); *Bravman* v. *Baxter Healthcare Corp.*, 842 F. Supp. 747, 755 (S.D.N.Y. 1994); *Griffin* v. *Medtronic, Inc.*, 840 F. Supp. 396, 397 (D. Md. 1994); *Tucker* v. *Collagen Corp.*, 1994 WL 87367, *3 (N.D. Ill. Mar. 16, 1994); *Michael* v. *Shiley, Inc.*, 1994 WL 59349, *6 (E.D. Pa. Feb. 25, 1994); *Kemp* v. *Pfizer, Inc.*, 835 F. Supp. 1015, 1020 n.4 (E.D. Mich. 1993); *Reiter* v. *Zimmer, Inc.*, 830 F. Supp. 199, 203 (S.D.N.Y. 1993); *Cameron* v. *Howmedica, Div. of Pfizer Hosp. Prods. Group, Inc.*, 820 F. Supp. 317, 319 (E.D. Mich. 1993); *Hunsaker* v. *Surgidev Corp.*, 818 F. Supp. 744, 751 (M.D. Pa. 1992); *Covey* v. *Surgidev Corp.*, 815 F. Supp. 1089, 1094 (N.D. Ohio 1993).

[11] See, *e.g.*, *Shield* v. *Bayliner Marine Corp.*, 822 F. Supp. 81, 84 (D. Conn. 1993); *Shields* v. *Outboard Marine Corp.*, 776 F. Supp. 1579, 1581 (M.D. Ga. 1991); *Mowery* v. *Mercury Marine*, 773 F. Supp. 1012, 1017 (N.D. Ohio 1991); *Farner* v. *Brunswick Corp.*, 607 N.E.2d 562, 567 (Ill. App. Ct. 1992), app. denied, 616 N.E.2d 333 (1993).

480 U.S. 102, 114-115 (1987) (referring to state common law "safety standards"); *Shenker* v. *Baltimore & Ohio R.R.*, 374 U.S. 1, 11 (1963) ("negligence standards of the common law").

2. In finding no express preemption, the Eleventh Circuit also relied (Pet. App. 7a-8a) on its prior holding in *Taylor* that the Safety Act's savings clause, 15 U.S.C. 1397(k), which provides that compliance with a FMVSS "does not exempt any person from any liability under common law," bars express preemption of common law liability. 875 F.2d at 823-825.[12] The savings clause, however, serves two functions that are narrower than the function ascribed to it by the Eleventh Circuit. The court of appeals failed to address either function — or the decisions of this Court supporting this narrow interpretation of the savings clause. See *Morales* v. *Trans World Airlines, Inc.*, 112 S. Ct. 2031, 2037 (1992) ("general 'remedies' saving clause cannot be allowed to supersede the specific substantive pre-emption provision").

First, the savings clause indicates Congress' intent *not* to occupy the entire field of motor vehicle safety, so that common law claims could proceed in areas *not* covered by a safety standard. Faced with similar provisions in other statutes, this Court has interpreted them in this fashion. See *Chicago & N.W. Transp. Co.* v. *Kalo Brick & Tile Co.*, 450 U.S. 311, 328 (1981); *Pennsylvania R.R.* v. *Puritan Coal Mining Co.*, 237 U.S. 121, 130 (1915). Contrary to the

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[12] The court of appeals also noted that the statute in *Cipollone*, unlike the Safety Act, lacked a savings clause. This cannot be dispositive, however, because this Court found express preemption of common law claims in *Easterwood*, and the FRSA has a savings clause. See 113 S. Ct. at 1736; see also *Morales* v. *Trans World Airlines, Inc.*, 112 S. Ct. 2031, 2037-2040 (1992) (finding express preemption under the Airline Deregulation Act, which has a savings clause).

Eleventh Circuit's holding, the same interpretation should apply to Section 1397(k).

Second, the savings clause also preserves common law actions that do not conflict with, or frustrate the purpose of, applicable federal safety standards, even if they may be said to relate to the "same aspect of performance." This case is an excellent example: FMVSS 121 expressly grants, for safety reasons (see p. 2, *infra*), a choice whether to install antilock braking devices and provides specifications for those devices that are installed. The savings clause would thus preserve a common law claim that an antilock braking system was negligently manufactured. On the other hand, it would not preserve a common law action, such as the claims under review here, seeking to recover damages from a defendant merely for exercising a federally granted safety option. Such a lawsuit is inconsistent with FMVSS 121 because it extinguishes a choice granted, as a matter of safety, by NHTSA. See, *e.g.*, *Perry* v. *Mercedes Benz of North Am., Inc.*, 957 F.2d 1257, 1265 (5th Cir. 1992) (distinguishing a failure-to-install claim from a claim that a chosen system was not properly designed, and holding that the latter claim is not preempted).

This Court has often warned that general savings clauses should not be construed in an indiscriminate fashion to allow common law actions that would subvert a federal regulatory scheme. In *Texas & Pac. Ry.* v. *Abilene Cotton Oil Co.*, 204 U.S. 426, 446 (1907), the Court held that a general savings clause ("[n]othing in this act contained shall in any way abridge or alter [common law] remedies" (internal quotations omitted)) could not be read to save common law rights "the continued existence of which would be absolutely inconsistent with the provisions of the act." Such a reading, the Court instructed, would cause the federal statute to "destroy itself." *Ibid.*; see also *Morales*, 112 S. Ct. at 2037; *International Paper Co.* v. *Ouellette*, 479 U.S. 481, 494-95 (1987); *Offshore Logistics, Inc.* v. *Tallentire*, 477 U.S. 207, 223, 230

(1986); *Kalo Brick*, 450 U.S. at 318; *Pennsylvania R.R.*, 237 U.S. at 129. The court of appeals in this case overlooked these precedents in its construction of the savings clause in the Safety Act.

III. REVIEW IS NECESSARY TO CORRECT THE MISAPPLICATION OF THIS COURT'S PRECEDENTS AND TO RESOLVE THE CIRCUIT CONFLICT ON AN ISSUE OF SURPASSING IMPORTANCE

Prompt review of the Eleventh Circuit's decision is essential. The court of appeals has created a sharp conflict among the circuits on an issue of exceptional national significance. Moreover, because the court's error was based on a misreading of ambiguous language in this Court's decision in *Cipollone*, only this Court can correct the error.

If the Eleventh Circuit's drastic misconstruction of *Cipollone* stands, it will mean that state law can impose duties that plainly frustrate federal objectives or even make it *impossible* to comply with federal law duties under the Safety Act or other federal statutes. This result is plainly unacceptable and contrary to the Supremacy Clause and a century of established preemption doctrine. Yet, under the court of appeals' decision, this result is *required* whenever (1) the federal statute upon which the claim of preemption is based has an express preemption clause, and (2) that clause, narrowly construed, does not encompass the state law obligation forming the basis for the plaintiff's claim. In that event, an implied preemption defense would be unavailable, even if "compliance with both federal and state regulations is a physical impossibility" or if "state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Wisconsin Pub. Intervenor* v. *Mortier*, 111 S. Ct. 2476, 2482 (1991) (citations and internal quotation marks omitted).

Moreover, the court of appeals' erroneous reading of *Cipollone* leads to the anomalous result that a federal statute would have greater preemptive force *without* a preemption clause than with one. For example, if the Safety Act had no express preemption clause, the Eleventh Circuit's decision in *Taylor* would have compelled application of implied conflict preemption in this case. The *inclusion* of an express preemption clause in the statute, however, caused the Eleventh Circuit to reject implied federal preemption entirely. Needless to say, courts should seek to avoid attributing such an absurd design to Congress. See *Sheridan* v. *United States*, 487 U.S. 392, 402 n.7 (1988).

These unacceptable results flow directly from the Eleventh Circuit's plain misreading of *Cipollone* (on implied preemption) and blatant refusal to follow *Cipollone* (on express preemption). By holding that state common law claims do not fall within a federal express preemption provision unless the provision refers specifically to the common law *and* that the mere presence of an express preemption provision bars any implied preemption inquiry, the court of appeals has sanctioned a regime in which the states may wholly frustrate the purposes of a federal statutory scheme so long as they act through their common law.

Until this confusion is resolved, ATA's members cannot know whether the trucks they put on the road meet all applicable legal standards. Although the federal government decided — for safety reasons — to make antilock brakes optional on trucks and trailers, a jury in Georgia or Maine or California might decide that antilock brakes are required to meet a common law duty of care. On the other hand, juries in Alabama or New Hampshire or Oregon might decide that antilock brakes are dangerous and breach common law standards in those jurisdictions. The adverse effects on safety and interstate commerce of nonuniform standards are clear. Furthermore, the importance of this issue extends beyond national motor vehicle safety to drugs, medical devices,

pesticides, and numerous other areas of federal health and safety regulation where federal uniformity is critical.

This Court should correct the Eleventh Circuit's unprecedented misinterpretation of *Cipollone*, which would bring about "a radical reworking of our law" (*Osborne* v. *Ohio*, 495 U.S. 103, 119 (1990)).

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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